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THE  
S P E E C H E S  
OF THE

JUDGES of the Court of EXCHEQUER,

Upon granting a NEW TRIAL,

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IN THE CASE OF

Capt. *Evelyn Sutton*, against Com<sup>r</sup> *George Johnstone*;

On the 30th Day of JUNE, 1785.

TOGETHER WITH

Mr. Baron EYRE's S P E E C H,

On the MOTION to arrest the JUDGEMENT,

On the 15th Day of JUNE, 1785.

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Taken in Short Hand, by JOSEPH GURNEY.

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# The ARTICLES of WAR upon which the Charge against Captain SUTTON was founded.

Act 22 GEO. II. Cap. 33.

## ARTICLE XI.

**E**VERY Person in the Fleet, who shall not duly observe the Orders of the Admiral, Flag Officer, Commander of any Squadron or Division, or other his Superior Officer, for assailing, joining Battle with, or making Defence against any Fleet, Squadron, or Ship; or shall not obey the Orders of his Superior Officer as aforesaid, in Time of Action, to the best of his Power; or shall not use all possible Endeavours to put the same effectually in Execution, every such Person so offending, and being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment, as, from the Nature and Degree of the Offence, a Court Martial shall deem him to deserve.

## ARTICLE XIV.

If, when Action, or any Service shall be commanded, any Person in the Fleet shall presume to delay or discourage the said Action or Service, upon Pretence of Arrears of Wages, or upon any Pretence whatsoever, every Person so offending, being convicted thereof by the Sentence of the Court Martial, shall suffer Death, or such other Punishment, as from the Nature and Degree of the Offence a Court Martial shall deem him to deserve.

## ARTICLE XXII.

If any Officer, Mariner, Soldier, or other Person in the Fleet shall strike any of his Superior Officers, or draw, or offer to draw, or lift up any Weapon against him, being in the Execution of his Office, on any Pretence whatsoever, every such Person being convicted of any such Offence, by the Sentence of a Court Martial, shall suffer Death. And if any Officer, Mariner, Soldier, or other Person in the Fleet shall presume to quarrel with any of his Superior Officers, being in the Execution of his Office; or shall disobey any lawful Command of any of his Superior Officers, every such Person being convicted of any such Offence by the Sentence of a Court Martial, shall suffer Death, or such other Punishment as shall, according to the Nature and Degree of his Offence, be inflicted upon him by the Sentence of a Court Martial.

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In the Exchequer, { EVELYN SUTTON, Esq;  
VERSUS  
{ GEORGE JOHNSTONE, Esq;

T H E  
S P E E C H E S of the J U D G E S  
On granting a New Trial.

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Lord Chief Baron S K Y N N E R.

**T**HIS is an Action which has been brought against the Defendant, Commodore *Johnstone*, for having maliciously, and without probable Cause, charged the Plaintiff, Captain *Sutton*, with delaying and discouraging the Public Service, by disobeying his verbal Orders and public Signals, in not causing the Cable of the Ship which he commanded to be cut or slipped, immediately after his going on board her, in order to put to Sea after the Enemy; and also for falling astern, and not keeping up in the Line of Battle, according to the Signal then abroad, after the *Isis* had joined the Squadron, &c. and that upon this Charge he arrested him, and kept him in Confinement for a long Space of Time, until he was afterwards brought to a Court Martial, where he was honourably acquitted of this Charge that was made against him.

It seems to have been agreed by the Counsel on both Sides, that the Directions which, upon the Trial of this Cause, I gave to the Jury, were right: namely, That they must be satisfied that this Action had for its Foundation Malice on the Part of the Defendant towards the Plaintiff, and that they must be satisfied that the Charge made by Commodore *Johnstone* against the Plaintiff, was founded in a malicious and wilful Design to ruin and oppress him, without any reasonable Ground or Cause for so doing. The Situation of Commodore *Johnstone*, as Commander of the Fleet, was such, as made it his Duty to superintend the Conduct of all the Officers under his Command; to suspend, to arrest, and to bring to Trial, all such of whom he saw an apparent and reasonable Cause to judge guilty of any Disobedience to the Orders he had given; and if, in arresting, imprisoning,

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or

or charging any Officer under his Command, he has proceeded under the Sense of his Duty to the Public, to the Discharge of that Power with which he was entrusted, and has done it without any ill or malicious Designs, but with Uprightness and Integrity, he is not answerable for the Event that such a Charge shall produce, whether the Person whom he so accuses shall finally be found guilty or not; I say, if he has acted with Uprightness and Integrity, he is by Law protected, and such an Action as this is not to be maintained against him. The Enquiry then, upon the present Occasion, must be, What was Commodore *Johnstone's* Conduct upon this Occasion? And in order to consider of that properly, as far as it is applicable to the present Enquiry, it will not be necessary for me to enter into a minute Consideration of all the Evidence that has been given; because I think it must depend upon so much of his Conduct as particularly related to what passed between him and Captain *Sutton*, and to Captain *Sutton's* Conduct at the Time to which the Evidence is particularly applied; namely, after the Time at which the Engagement ceased, and Commodore *Johnstone's* Orders were given to *Sutton*, and the subsequent Part of that Day. Now it appears, that Commodore *Johnstone* had thrown out a Signal for all Captains to come on board, soon after the Engagement ceased. The very exact Time at which the different Signals were made, seems to have been differently spoken of by the Witnesses, and it is impossible but that upon such Occasions, and respecting such Circumstances as that, there must be a Difference of Recollection. Captain *Sutton* did not come on board so soon as the other Captains did, but that Delay is accounted for by his not having a Boat belonging to his Ship in which he could entrust himself to go. He went on board the Commodore's Ship, and there he received the Orders of the Commodore, to get his Ship ready and go to Sea, for he meant immediately to engage the Enemy; and the Directions appear to have been given on the Part of the Commodore without any Appearance of Anger or Repentment which at that Time affected him towards Captain *Sutton*. Captain *Sutton* applied himself, as it seems, to Captain *Home*, the Captain of Commodore *Johnstone's* Ship, and told him, his Officers were of Opinion that his Ship could not immediately obey that Order and go to Sea, and desired that he would mention it to Commodore *Johnstone*: He declined so doing; but desired that Captain *Sutton* would himself acquaint the Commodore with the Circumstance: And when he applied to the Commodore, and told him what his Officers Opinion was, Commodore *Johnstone* then immediately told him, "I don't mind the Reason which you have given, I have heard those Reasons before; the Opinion of your Officers is immaterial: You have my positive Orders to go to Sea; and as to the Risk, if there is any, I take it upon myself:" And it appears, that those Orders, so repeated, were given or repeated to him with some Warmth. Captain *Sutton* went immediately on board his Ship. In the mean Time it appears, from the Evidence given on the Part of Captain *Sutton*, because it appears from the Letter read by him, that Captain *Home* had advised Commodore *Johnstone* to supersede him, or to send some Officer of his own to take the Command of that Ship, from the Appearance that Captain *Sutton* had then given of Backwardness to obey his Orders. Commodore *Johnstone* did not listen to that Advice, but said, it was improper for him to take that Step before some Overt-act had been done; and there would be no Authority in the Ship if he should send another Person there to take the Command.

mand. Commodore *Johnstone* therefore refused to listen to that Advice so given to him, and permitted Captain *Sutton* to continue in the Command of his Ship. The Orders which he had so given were not obeyed for a considerable Space of Time. In the mean time, Captain *Hawker*, the Captain of the *Hero*, came within Hail of Commodore *Johnstone*, and delivered to him a Message from Captain *Sutton*, signifying that he was repairing his Damages, and would come out as soon as they were finished, or as soon as he could. Commodore *Johnstone* appears then to have continued in the same Degree of Dissatisfaction at Captain *Sutton's* Conduct, which he had adopted upon Captain *Sutton's* Representation to him of the State of the Ship, said, with some Degree of Warmth, I don't care for his Repairs, or something to that Purpose, he has my positive Orders to come out. Many Signals were made by firing of Guns to him, and Captain *Sutton* did not come out until a considerable Time afterwards. The Witnesses have differed so much in the particular Time, that I will only observe, that it was not till a considerable Time after that Message had been delivered to him. When he came out and joined the Commodore, it appears that what passed between him and the Commodore was accompanied still with some Degree of Dissatisfaction remaining with Commodore *Johnstone* at the Time, because, though the Witnesses have given different Accounts of what passed betwixt *Johnstone* and *Sutton*, yet they all shew manifestly, that there was a Dissatisfaction on the Part of Commodore *Johnstone* by the Language which he then used to him; because it is admitted, that Captain *Sutton* answered to him, He would, or he did make no Excuse; Commodore *Johnstone* must have said something that led him to give an Answer of that Kind to him. After the Line of Battle had been broke, and the Resolutions had been taken not to engage the Fleet, it is said by some of the Witnesses, that Commodore *Johnstone* hailed his Ship, as enquiring after the Situation personally of Captain *Sutton*; but the Intent of Commodore *Johnstone*, manifestly to be drawn from his hailing, was to enquire after the State of the Ship. On the next Morning, Commodore *Johnstone* appears to have gone on board the Ship which Captain *Sutton* commanded; he there made an Enquiry into the State of the Ship from Captain *Sutton* himself, and took from Captain *Sutton* a Report of the Damages which the Ship had received; which Report was in Writing given to him by Captain *Sutton*, which had been made, as it appeared, by the Boatswain: And it is in Evidence, that at the Time he so went on board to make the Enquiry, he then told Captain *Sutton*, that he did intend to put him under an Arrest. Now these are the Circumstances that passed relative to the Disobedience of the Order not coming out. During the Course of that Day, and of the following Morning, the Squadron separated, as it appears. Immediately after this, Commodore *Johnstone* went to *Port Praya* in the *Diana* Frigate, where he arrived on the 19th. Captain *Sutton* arrived on the 21st, and upon the 22d he was put under an Arrest. Now it appears to me, that these Circumstances, thus stated, and without Doubt to be collected from the Evidence, do afford a *probable Case*, an apparent Reason for Commodore *Johnstone's* suspending and putting under Arrest, and charging Captain *Sutton* with this Disobedience, and go a great Way, as it seems to me, to exclude the Presumption of Malice; because it appears, that the first Orders were given in the most friendly Manner; that immediately upon



Captain *Sutton* hesitating about the Orders, the first Dissatisfaction of Commodore *Johnstone* was expressed, and that that was continued until the Time that he went on board the Ship on the 17th; and when, after an Enquiry, of Captain *Sutton*, as to the Grounds of his Conduct, he declared his Intention to put him under an Arrest. But it has been said that Commodore *Johnstone*, notwithstanding this apparent Disobedience of Orders, acted however rashly and indiscreetly, in pursuing Captain *Sutton* in the Manner he did, without putting him under an Arrest sooner, and without afterwards having made a farther and more particular Enquiry. It is said, that he ought to have put him under an Arrest as soon afterwards as he joined the Squadron, and after he came out; for that, as he had seen his Disobedience, and if he judged of it in the Manner he afterwards appears to have done, by making the Charge he did against Captain *Sutton*, he ought not to have suffered Captain *Sutton* to have commanded that Ship for the rest of the Day, and when he was going into Action. Now, I am not at all satisfied; it is a Subject a good Deal out of the Line of Men who are not in the Profession of the Sea; but it does not appear to me, that Commodore *Johnstone's* not delaying his Squadron to send an Officer to command Captain *Sutton's* Ship, and superseding him in the particular Situation he was then in, in his Line of Battle, going down to engage the Enemy, it does not appear to my Satisfaction at all, that Commodore *Johnstone* had not the same Opinion then of Captain *Sutton's* Conduct that he afterwards appears to have entertained, by charging him in the Manner he did, and bringing him to a Court Martial; and as to the Want of due Enquiry, it appears to me, that Commodore *Johnstone* made all that Enquiry which Captain *Sutton* could have a Right to require. He did not indeed, when he went on board, call Captain *Sutton's* Lieutenants around him to take their Account of Captain *Sutton's* Conduct; but Captain *Sutton* had, before Commodore *Johnstone* went on board the Ship, given his particular Reasons why he thought his Orders could not be obeyed; and Commodore *Johnstone* was to satisfy himself what the State of those Damages were which Captain *Sutton* had alleged, as the Cause of his not obeying his Commander in Chief. Commodore *Johnstone* could be an Eye Witness of them, as far as they were then capable of being viewed: He took the Account of them from Captain *Sutton*, and by a Report of the Boatswain of the Ship delivered to Captain *Sutton*, and given to Commodore *Johnstone*. Commodore *Johnstone* then had made all that Enquiry, which as between him and Captain *Sutton* could be necessary, because he had taken that Account which Captain *Sutton* thought proper to give. But it is said, that notwithstanding this, Captain *Sutton* appears, by the Sentence of the Court Martial, not to have been guilty of Disobedience of Orders, and therefore there was no probable Cause for charging him with such Disobedience. It was very truly said, that an Acquittal is very consistent with an Appearance, and with a strong Presumption of Guilt; and the Question upon this Occasion is not, whether Captain *Sutton* was actually guilty of Disobedience? but, whether Captain *Sutton* had, by his Conduct, afforded such Grounds to Commodore *Johnstone* as to presume a criminal Disobedience of Orders, as his (Commodore *Johnstone's*) Justification for charging him with it? It is impossible that we can know what were the Grounds, what were the Evidence upon which the Court Martial formed its Determination, for that Evidence cannot be before us. It appeared to me at the



the Trial, that the Boatswain, who made out that Report which Captain *Sutton* gave to Commodore *Johnstone*, was prepared to give a larger Account of the Damages which the Ship had sustained, than had been given to Commodore *Johnstone*. Now, supposing a much larger Account of those Damages, and of a different Kind, to have been given to the Court Martial than that which was contained in the Report given to Commodore *Johnstone*, it might make the Acquittal by the Court Martial no Rule whatever to judge of Commodore *Johnstone's* Conduct, because he was to form his Opinion of the Conduct of Captain *Sutton* from the Account which Captain *Sutton* had himself given to him; and if, in fact, his Damages were so much larger as to justify the Disobedience of the Order which he had received, Commodore *Johnstone* could only form his Opinion by the Account of them which he had received; and it appears to me, from the Evidence which was given by all the Officers at the Time of the Trial, both those who were examined for Commodore *Johnstone*, and those who were examined for Captain *Sutton*, that the Disobedience of the Orders was a Ground for Commodore *Johnstone's* charging Captain *Sutton* in the Manner he did; for they all say, they should have held themselves bound (for that was the Purport of their Evidence) to obey those Orders, if they had been in the Situation in which Captain *Sutton* was. I profess then, to me it appears, that there was this apparent Ground, and probable Cause for Commodore *Johnstone's* charging Captain *Sutton* with the Offence that he did, and that he did it upon such Grounds as does, in a great Manner, exclude the Presumption of Malice. I don't mean to say, that there was not such Evidence of Malice as was properly to be left to the Jury, but I profess the Verdict as given upon it, was not so satisfactory to me as not to make me wish very strongly to have this Question reconsidered. It has been urged very strongly against this, that there were Witnesses produced in the Cause, on the Part of Commodore *Johnstone*, whose Testimony did import Malice from Commodore *Johnstone* towards Captain *Sutton*, and which was, from the Nature of it, to be applied precedent to the Time of making the Charge, namely, the Two Witnesses who swore that the Cable was cut on the Inside in the Morning at Nine o'Clock. It is said, this is Evidence of anterior Malice, because it charges Captain *Sutton* with an Act of Cowardice which he was not charged with before the Court Martial, and of which, to this Time, there had never been any Imputation. The Evidence of these Two Witnesses, supposing the Account they gave was to be considered as true, were intended to answer a very material Part of the Plaintiff Captain *Sutton's* Evidence, which he had given, and which he had made his Justification for not obeying the Orders, namely, that there had been occasioned a considerable Delay by the Cable having been cut Ten Minutes before the Ship got loose, on account of the Cable jamming in the Hawse-hole, as it was said, and there being a Necessity afterwards of cutting it on the Outside. Now, it has not been imputed to Commodore *Johnstone*, that he brought these Witnesses, knowing that they were to give a false Testimony: Nor can it, I believe, be presumed, that such were Commodore *Johnstone's* Intentions. Commodore *Johnstone* then brought these Two Witnesses, upon the Supposition that they would give Evidence very material to his Defence. These Witnesses were not believed; but it does not, in my Opinion, warrant a conclusive Argument in the Manner in which it has been

been drawn, that these Witnesses, thus produced, do afford positive Proof of anterior Malice in Commodore *Johnstone*. That not being the Case, I profess myself to think, there is no Reason drawn from the Circumstance of these Two Witnesses to prevent the Court granting this new Trial, which, I profess, I am very strongly of Opinion the Court ought to direct.

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Mr. Baron E Y R E.

THIS is an Action, the Ground of which is, that the Defendant had maliciously preferred an Accusation against the Plaintiff, for which there was no probable Foundation in Law and in Fact. The essential and the integral Grounds of this Action are *Malice and Want of probable Cause*; they are perfectly independent and substantive in their Nature, though in Evidence they are often confounded, though one is sometimes made use of to evince the other. If a Man were to prefer the most unfounded Charge that ever entered into the Imagination of the wildest Man, and could demonstrate that he had not done it upon the Motives of what the Law calls Malice, no Action could lie. On the other hand, if a Man were to prefer a grounded Charge upon the deepest Malignity that ever corrupted the human Heart, no Action would lie. It is very true, that if it appears to Demonstration that there is no possible Cause, the Want of a probable Cause also suggests the Want of a Motive for such a Prosecution, other than Malignity; and therefore it is, that the Want of probable Cause, clearly made out, brought home to the Knowledge of the Party, that he is conscious that there is no probable Cause will be received as Evidence of the other integral Ground of this Action, which is Malice; but unless it is not only true that there is no probable Cause, but it is also brought home to the Party who insists upon the Prosecution, that he knew there was none, though a Want of probable Cause may be established by such Evidence, Malice will not. What shall be deemed probable Cause should be a little understood. It is not an idle, totally unfounded Whim, of the honestest Man in the World, that would be received as probable Cause; but it is such Appearances of Foundation, as standing unexplained to the Party who conceives them, and who acts upon them, are reasonable and proper Motives for pressing the Accusation; and therefore it will always depend upon the particular Circumstances of every particular Case. In this Court, the Idea of probable Cause is, perhaps, more familiar than it is in any other Court in *Westminster-hall*; we oftener are called upon to judge of it; we certify probable Cause every Day. A Case this Moment occurs to my Memory; There was a Seizure of a Quantity of Gloves in a Glover's Shop in the *Strand*; they were seized, as being of *French* Manufacture and imported, being a prohibited Article. The Fact was, that they were cut in the *French* Fashion, with a Gore, which is peculiar to their Manufacture, and they were in *French* Packages; the Fact also turned out to be, upon Explanation, that the Glover, finding that it was necessary to impose upon fashionable People, who preferred having the

the best *French* Gloves, was obliged to have them cut in this Fashion, though pure *English* Manufacture, and obliged to get *French* Papers to pack them in, in order to satisfy the Taste of those fashionable People. The Fact being proved clearly, there was an End of the Seizure. The Goods were restored; but at the same Time the probable Cause of Seizure was clearly established: There was that which imposed upon the Judgment of the Officer, without any Imputation upon him; Appearances strong in his Favour: So there was a probable Cause for Seizure, which the Court had no Difficulty to determine upon; so there is nothing more distinct than that which turns out upon Explanation, and that Cause that the Party takes for granted, he shall maintain from the Fact he insists upon. I, for one, am extremely sorry that any Thing should have arisen between Officers of high Rank, in a Service of the utmost Importance to this Country the Naval Service, which should have called for an Application of those Principles which I have been just now laying down; and I am the more concerned, that it falls to my Lot, for one, to enter into the Discussion, inasmuch as it is a Subject which, from the Nature of it, I must be totally unacquainted with; the Discussion of which must be in Terms with which I am not familiar; which I do not comprehend; and the Observations upon which go so far, that as to One Half of this Evidence, I have not an Idea of what it imports: But, however, the Rights of the Subject, the Right of this Plaintiff, who applies to the Laws of his Country for a Satisfaction for that which he conceives to be a personal Injury done to him, in the Course of a great Naval Operation, are involved in this Naval Subject, and obliges, therefore, Men very incompetent to the Discussion of it to enter into it, and to deal with it as well as they may; I own I tremble for what I am doing, lest with Intentions to do Justice to the Parties, my Want of Acquaintance with the Subject, after all the Pains I have taken to inform myself of it, may lead me into some Mistake and Error. However, I am bound to act upon the best Lights before me, and must extricate myself out of those Difficulties as well as I can, and I hope without doing Injustice to the Parties. It must be taken in this Cause upon the Ground of the Acquittal of Captain *Sutton*, upon the Trial by the Court Martial, that Captain *Sutton* was not guilty of that Disobedience of which he stood accused by the Defendant, by not making sail in the Manner in which the Defendant charges he ought to have done; but the particular Grounds upon which that Acquittal proceeded in Evidence, are not before us; and therefore beyond the Fact that he must be taken to be Not Guilty, the Verdict of the Court Martial does not apply; and therefore it is like the Case that I referred to; the Verdict acquitting the Goods and restoring them to the Party, though very decisive as to the Ground of the Seizure, that they were not of *French* Manufacture, yet they did not go a Jot to determine whether there was or was not a probable Cause for the Accusation which brought them under Consideration for Seizure. So that it is impossible to carry the Verdict of the Court Martial beyond that Point. Consistent with that Point are both the Parts of this Case; namely, the Two Questions, whether there was Malice, and whether there was probable Cause in this Case; if we were to admit that there was probable Cause for preferring this Accusation, I think no Man will urge that there was sufficient Evidence of Malice; the Charge of Malice takes for its main Group



Ground that there was no probable Cause for Prosecution; for if there really was a probable Cause for Prosecution, it would be vastly too much to say, that because it happened that this Transaction arose at a great Distance from this Country, and consequently that an Arrest, and the Intention of bringing the Party to a Court Martial, was unavoidably attended with great personal Inconvenience to the Party arrested, that that alone can be a Foundation from whence Malice shall be imputed, or that the Case shall be different from what it would have been, had the Transaction happened in *Torbay*, and the Party had been arrested and brought to his Trial within Twenty-four Hours after the Thing happened. It was an unfortunate Circumstance, not sufficiently to be regretted, that such a Transaction should happen at such a Distance, where there being probable Cause to arrest this Gentleman, and put him upon his Trial, and where Reasons of high Probability, at least, may be suggested, why it was not fit to bring him to that Trial during the Time they remained in that Port, or in the Passage to *Saldanha Bay*, or after in *Saldanha Bay*, where I take it the Separation was, it should be unfortunately attended with great Inconvenience to him; but there is no Foundation to infer Malice, in the Prosecution arising from that Circumstance of Distress, which the Arrest in that Situation must necessarily produce; for indeed if we consider how far that goes, and how extremely diabolical the Heart of that Man must be, who would mean to put an inferior Officer, acting under him, under an Arrest for the Purpose, and with a View of making it so distressing as this turned out to be; I think no Man ought to believe that of another, without there was strong and urgent Evidence, which should make it impossible for him to resist the Belief. I discover no Evidence of that Sort in this Cause; and I trust that there are no Naval Officers to whom any Thing so wicked could, with any Foundation of Probability, be imputed; I won't say, that if it was clear that there was no Sort of Foundation for this Charge, that that being established, that the Circumstance of the Charge, so unfounded, being made in such a Situation, where it must necessarily produce such terrible Consequences to the Party upon whom that was made, and where it must involve him in such Loss, such Expence; where it must be so long, of Necessity, before it could come to a Decision; I don't say that they would not be Circumstances, taking their original Foundations in the Thing itself being totally unfounded, which would not warrant an Imputation of Malice, in the Manner of making that unfounded Charge, both as to Time and Place; but that is not the Case upon this Evidence; and I am very glad that I can ground the Opinion that I have upon the Case, upon that Part of it, upon Facts that are admitted in the Cause, that stand clear of all technical Language, and upon which there is not the least Contradiction. I cannot help observing, that when we are discussing the Question, whether or not there was probable Cause for the Accusation which Commodore *Johnstone* made against Captain *Sutton*? the Mode of discussing it has really been, in Effect, trying that Question over again; and a very solemn Trial there has been of it, and a vast Quantity of Evidence adduced, and so much Evidence adduced, as, if the Court were competent to try it, and this were the Moment when it were to be tried, might exceedingly puzzle the Court how to decide. But this Fact is most clear, *that positive Orders were given to Captain Sutton to cut or slip*. It is most clear that it was the Duty of Cap-  
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tain *Sutton*, under that Order, to be the first to cut or slip, his Situation called upon him to do so; so they all agree. It is most clear, that he was the last; so that the Disobedience of that positive Order stands clear of all Questions, and is agreed to on all Sides; and it was necessary for Captain *Sutton*, at the Court Martial, so the Terms of the Sentence import, it was necessary for Captain *Sutton* to go into the Evidence, to raise upon that Evidence Ground of Justification, which, admitting the Fact of the Disobedience, might be a Reason why that Disobedience, in that particular Case, should not be wilful, a great deal of important Evidence has been offered by Captain *Sutton* upon this Point, perhaps the Weight of the Evidence inclines that way. I am far from imputing any Blame; it would be presumptuous in me to do it upon those who have decided, having the Jurisdiction to do so, upon that Evidence that he stood justified; but if it was necessary that Captain *Sutton* should show that Justification, and if that Justification was to turn upon the Number and the Weight of the Testimony, upon the Result of great contradictory Evidence, with respect to it, is it possible to say that the Commodore, whose Business was not to decide, but whose Business was only to accuse, and to bring the Case to the competent Jurisdiction for Decision, that he had not a probable Cause for preferring that Accusation? What had he to do more, when he brought his Accusation forward, but to say, here is the Proof of my Order to cut or slip? Here is the Proof that you was to cut or slip immediately, the first of the Squadron; it appears in fact that you cut or slipped the last; I will go no further. Would it not have been incumbent upon Captain *Sutton* to have then taken up the Defence; and to have urged in his Defence, that it was very true he had disobeyed Orders; but it was under such Circumstances, the whole of it taken into Consideration, as may, consistent with the Discipline of the Navy, amount to a Justification, or to an Excuse, or it might be within the Rules of the Navy criminal, and yet, in respect of some Circumstance that happened to arise from it, meritorious; so that though he might be reprimanded, or perhaps be obliged to ask for a Pardon, would possibly be intitled to a Reward immediately afterwards, and yet the Nature of the Defence would remain entirely the same; and therefore to say, that where the Fact of Disobedience stands clear of all Question in point of Fact, and where it all turns upon the Justification, and upon that a great Variety of Evidence, to say there was no probable Cause for the Accusation, is carrying the Idea of probable Cause to a Length that to me is perfectly incomprehensible; there never, in my Mind, was any Thing clearer, than that the probable Cause, in this Case, was fully and satisfactorily made out; not upon the contradictory Evidence; laying all that out of the Case, taking which Side you will, admit the Whole of the Evidence on the Part of the Plaintiff in this Cause ought to be believed, and the other Evidence, except as to the actual Disobedience in point of Fact, all disbelieved; yet it being the Defendant's Evidence; and it being Evidence which could not be the whole of it within the Knowledge of the Commodore at the Time he preferred his Accusation, he was not bound to know it, nor to enter into it; he had good Reason for preferring his Accusation. Captain *Sutton* has been heard upon it, and has been acquitted; I rejoice at it: But let it not be concluded that it is a necessary Consequence, that a Commander in Chief, who is bound to exercise his Judgment upon the

the Conduct of his inferior Officer's having the Discipline of the Navy to maintain, is of course to be prosecuted civilly, and with a View to pecuniary Damages; because, in exercising his Judgment, it has unfortunately occurred, that it became necessary for him to accuse under Circumstances, which produced great Hardships to Mr. *Sutton*, upon a Case which required Explanation, and which Explanation could not with Convenience be had, but under such Circumstances as turned out to be very injurious to Mr. *Sutton*. I cannot think that the Discipline of the Navy, and the Good of that important Service to this Country, ought to rest upon such Transactions as these are. I am not sorry that my Opinion upon this Point leads me to concur in Opinion that there ought to be a new Trial, because I own I feel very averse to the sustaining this Verdict, which has entirely proceeded by the Rashness, I will call it, of the Defendant in this Cause, in pressing forward a Kind of Examination which he ought to have resisted. I say, when the Cause has proceeded upon Grounds perfectly collateral, in my Apprehension, to the true Merits of it; Grounds of a Nature extremely likely to irritate, and to carry Men from the cool Consideration of the true Question, upon Grounds upon which all our Politicians in this Country, those who understand the Subject, and those who do not, have been extremely divided; and Grounds which, till they are properly decided by proper Authority, I suppose will ever remain Matter of great Discussion, upon which you will not easily find any Two Men who are not Seamen—Seamen, I dare say, understand it; but any Two Men who are not Seamen, who will not have a very positive and a very ignorant Opinion of it one Way or other; and how it is possible this Defendant could think of taking upon himself such a Point of Delicacy as this was, against the good Sense of his Counsel, and pressing it on in the Manner in which I understand it was pressed, is to me incomprehensible. I conceive he will be wiser another Time. I confess I should have been very sorry if the Cause had stood upon Evidence of such a Nature, which had no Connection with the Cause; there was an Attempt to connect it; but that was done by conjecturing that the Motive might be to conceal a Misconduct of Commodore *Johnstone's* own; and having laid that as a Foundation, giving that Evidence of a Misconduct in order to connect it, it would have been necessary to shew, in point of Fact, that it was his Motive; that he had charged Captain *Sutton*, in order to draw off the Attention of the publick Eye from himself to Captain *Sutton*. Some Evidence of that should have been offered, and then the Nature of that Misconduct would have been a Subject of collateral Enquiry, introduced into a Cause with which it had no Connection. There was no one Fact in the World, that could have been stated in the Conduct of Commodore *Johnstone*, in any Part of his Life, that might not as well have been brought into this Cause, as that Business, *viz.* Whether Mr. *Johnstone* was or not justified in the Conduct that he held when he came into this Harbour, and made the Disposition that it appears in Evidence that he made. There seems to me to remain but one other Subject; namely, the Circumstance of Commodore *Johnstone's* having offered Evidence, which turned out to be Evidence which the Jury gave no Credit to, with respect to a Fact of Captain *Sutton's* having cut his Cable in the Morning, upon the *French* Fleet entering the Port: And it seems to me, that those, who are on the Side of Captain *Sutton*, have been as jealous for him, and been as eager to draw that Fact from

from the true Application of it, to a Subject to which it was not meant to apply ; as on the other Side, they were eager to draw the whole Subject from the proper Train it ought to have been in ; for that by no means went to affix any Imputation upon Captain *Sutton* of the Kind alluded to. In the first place, it did not appear that it was under any Order from Captain *Sutton* : The Tendency of it rather was, if the Thing was true, upon an Alarm being given, by a Kind of sudden Impulse of the Crew, there being Reason to apprehend that a very superior Force was coming upon them, which, in their Situation, they would be unable to resist ; they were to cut, in order to take their Opportunity of getting to Sea, in order to take the Opportunity of getting off. I am not Judge enough of the Subject to know, whether, before the Event had been decided, it would have been, the most prudent Step for all these Ships to have taken, or not. It depended a little, I should imagine, upon how Monsieur *Suffrein* sustained the Conflict he thought fit to enter into. Had that Action been sustained in the Way in which I believe an *English* Squadron would have sustained it, I don't know whether such a Measure, for getting off as soon as possible, would not have been a wise Measure ; and that is a Question merely hypothetical : And as to the Point of imputing Blame to Captain *Sutton*, it failed, and it had a direct Reference to another Subject ; namely, as to the Case Commodore *Johnstone* had to sustain, and to which he had an undoubted Right to call his Witnesses ; for it being attempted to clear up a Part of the Delay, by accounting for Ten Minutes Delay by the Cable having been cut inside, and getting into that Situation he described ; if he could establish the Point that the Cable was cut in the Morning, to be sure he threw upon Captain *Sutton* the Difficulty of Ten Minutes more, which his Evidence did not go to ; and therefore it was directly in point to his Disobedience of Orders. I don't know whether I did not omit, in considering the Accusation, to take Notice of the second Part of it, which was his not continuing in the Line at Sun-set ; there is more Difficulty in that, had it stood alone. I should have had more Difficulty about that ; I should be obliged to examine with more Particularity than I wish to do, the Evidence relating to it ; but thus much I collect from the Evidence of Captain *Alms*, that a Signal was out at Sun set for the *Isis*, not being in her Station ; he afterwards said, about Sun-set she did come into her Station ; that is bringing it to a pretty nice Point ; and though it may be, upon so nice a Point, a proper Subject for Acquittal, it by no means follows, that a Ship under the Circumstances this Ship was described to be in, where there had been a Disobedience of Orders, in not coming out so soon as was expected ; and upon coming out, her Main-sail not set, it will be too much, to say even with respect to that, that there was not a probable Cause for the Accusation, how much soever it might turn out that he was justified in it. I am extremely satisfied, upon the whole, that if the Defendant asks upon this Verdict to set it aside, it must be set aside.



## Mr. Baron H O T H A M.

AS the Day is far spent, and as my Opinion coincides with my Lord Chief Baron, and my Brother *Eyre*, of course there must be a new Trial. That being the Case, I shall purposely avoid going into any Observations upon the Evidence that has been given, because, as it is to go to another Trial, it is fit it should go with as little Prejudice as possible; but I shall content myself with stating, in a very few Words, the Reasons for my coinciding in this Opinion. In the first place, It is impossible to controvert this, that there has been, no Matter by what Cause, there has been a vast Variety of Matter mixed in this Cause, that ought not to have been introduced into it. I am not at all surprised that my Lord Chief Baron suffered it to be given, because, when he saw a Gentleman, the Defendant, begging and praying that this Evidence might be gone into on the one Side, and the Plaintiff's Counsel as solicitous on the other, that it should, it was a Matter of great Difficulty and Delicacy for him to have interposed and prevented it, and therefore I don't wonder that he suffered it to be given; but, unquestionably, all that related to Commodore *Johnstone's* Conduct at *Port Praya*, had, as my Brother *Eyre* has just said, nothing to do with the Cause; but though it had nothing to do with it, it is absolutely impossible that the Jury should have attended to it, without mixing it in some Degree with the Opinions which they were to form upon the Whole of what they heard; that I think, therefore, is one Ground why one should wish that the Matter goes back to another Trial, that it might go to the Jury pure, simple, and unmixed, without any Sort of extraneous Matter of this Kind; the single Question then before the Jury was, Whether or no upon the Whole of the Case there appeared in Commodore *Johnstone's* Conduct towards Captain *Sutton*, that Degree of Malice which ought to make him answer in this Action for it. Now, with respect to that, if Commodore *Johnstone* could shew that there was probable Cause for his bringing Captain *Sutton* to a Court Martial, it does in my Apprehension exclude the Presumption and Idea of Malice: It is said there was no such probable Cause; there could be no such probable Cause, for Captain *Sutton* was brought to a Court Martial, and after the Charge was investigated, he was acquitted by that Court. We all rejoice in his Acquittal; I should hope Commodore *Johnstone* himself does; but it by no means follows, that because he was acquitted of the Charge, that therefore Commodore *Johnstone* was not well justified in bringing him to Trial; and it would be a most serious Thing indeed to all Commanders in Chief, if, before they ventured to exercise what is an absolute and indispensable Part of their Duty; namely, to bring the Officers under their Command to Justice, if in their Opinion they disobey the Orders that are given; it would be a very cruel Situation indeed for them to stand in, if before they venture to enter upon that necessary Part of their Duty, they were to be sure of the Sentence of a Court Martial; it is impossible they ever should be sure of that Sentence; they cannot foresee what Credit may be given to the Witnesses; what Turn the Trial may take; and therefore it must always be a Matter of Hazard and Risque to them: That  
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being so upon this Evidence, without going into the Evidence at large, was there or was there not any Thing that did afford a probable Cause of Suspicion to Commodore *Johnstone*? In my Opinion there certainly was; he gave a positive explicit Order in his own Person; that Order he frequently repeated by Signal; he saw that Order for a considerable Length of Time, though as to the precise Time the Witnesses differ very much, but they all agree that for some Time he saw that Order disobeyed; that therefore was, *prima facie*, a sufficient Cause for him to call upon Captain *Sutton* to say, you must prove before a Court Martial why this Delay was occasioned; you must give some Account of it: Well, but it is said if Commodore *Johnstone* had given himself the Trouble to enquire of the Officers on board of the *Isis*, he would then have received the Satisfaction that the World has received. For he would have found upon that Enquiry, that Captain *Sutton* had really and truly not been guilty of a Misconduct. Now, with respect to that, it might have been humane, it might have been candid, it might have been kind; but I do not know that Commodore *Johnstone*, as the Commander in Chief, was bound to ask any Officer under his Command for such Explanation, the Fact fell within his own direct Knowledge, he saw it with his own Eyes: He did go on board Captain *Sutton* the next Day, and asked him to explain it. *Sutton* gave him a List of the Damages he had received: Commodore *Johnstone* had exercised his Judgment upon that before, he continued to have the same Opinion of it then. If this is all you have to say, it is not enough; I must bring you to Trial. It would be exceedingly dangerous if Commodore *Johnstone*, or any Commander in Chief, was to talk to the Officers of the Fleet upon the Subject, because he could not talk to them in the Way that they ought to be talked to when they came to give their Evidence upon the Court Martial; it would be (as was said by one of the Counsel) highly indelicate for any Commander to enter into that Discussion; it would be trying Captain *Sutton* at the Moment that he ought not to do so; but supposing he had done this, and that he had taken the Trouble to ask all the Officers, and to examine every Witness who has been examined in this Cause as to the Conduct of Captain *Sutton*; and supposing they had done what we suppose they must have done, have given Commodore *Johnstone* exactly the same Account they have given now, what must have been the Consequence? Commodore *Johnstone* must have felt himself in a Dilemma: He must have said, "I stand here with contradictory Evidence; some Officers say one Thing, other Officers say another, what am I to do; I cannot decide between them; a Court Martial must decide; and therefore, if he had had all the Light he has now, it seems to me that the Contradiction which he would have heard in the Account the Evidences have given, would have amounted to that probable Cause of Suspicion in his Mind that would have justified him in bringing Captain *Sutton* to Trial. With respect to the Malice; express Malice, unquestionably, there has not been proved; Circumstances of Malice have been laid before the Jury: How far they amount to convict the Commodore of so very base a Purpose as that, is for the Jury to decide; that we have nothing to do with; but, however, it does appear so far, from all the Evidence that has been laid before us, that very little more, if any Thing, has happened in this Case than what happens from the Event of every Court Martial; no previous Hardship, no Acrimony of Behaviour, nothing in Words, in Looks, in Action, nothing

nothing that passed between the Commodore and Captain *Sutton*, that can import any previous Malice. As far as Letters shew the Conduct of Commodore *Johnstone* afterwards, there does not seem to be any Want of Accommodation to Captain *Sutton* after the Thing had happened; but to be sure, so far he was put to great Inconvenience, he was subject to the Peril and Disgrace of a Court Martial, and he was acquitted; that happens to every Man who has the same Fate.

These Grounds, I think, are sufficient to induce the Court to grant a new Trial; but, exclusive of these Grounds, I think that there are other Parts of this Case that may justify the Court in wishing that it may be reconsidered. The very Novelty of the Question, the Question itself, so new to every Body who has heard it discussed, the Importance of it so vast to the Service, it is of the utmost Consequence that every Commander in Chief in the Navy should know precisely and particularly how this is to stand in future. Are they to be called in question whenever an Officer happens to be acquitted that they have brought to Trial? or, must positive and direct Malice be proved against them? When they know that, and it is fit they should know it, then they will know how to act. In this State of it, I own, for my own Part, without meaning to disparage the Conduct of any Gentleman upon the Jury, I have not heard the Name of any one of them; but it does not seem unnatural to suppose, that in a Question of this Kind, complicated with a vast Variety of Circumstances, of which, to be sure, they were not very cognizant, it is not at all unlikely to suppose, that they had not, during so very long a Trial, kept in their Minds the precise Point of the Question, though none of us, Nobody in the Kingdom but knows, that they received every possible Information and Instruction from my Lord Chief Baron who tried the Cause; yet, when we hear that it lasted from Ten o'Clock in the Morning till Eight the next Morning; when we find that there was a considerable Degree of Impatience in the Jury to have the Cause brought to a Conclusion, one does not wonder that perhaps they were not, during so very long a Discussion as this, constantly attending to the Point; and I own, I make no Difficulty in saying, I rather think they had not continually kept the true Point before them, for if there was no Malice in Commodore *Johnstone*; if he had a probable Cause, whatever has been the Event, of the Acquittal of Captain *Sutton*, it should not affect him; but, if there was a probable Cause for his seeing these Things at the Moment with this suspicious Eye, and there was no Malice in the Commodore in bringing him to Trial, but he brought him to Trial under a Sense of the Duty he thought he owed to the Public and the Service, they ought to have found a Verdict for him. But they were of a different Opinion; and if they took it into their Consideration, that from all the Circumstances of the Case, Malice might have been the Motive which actuated the Commodore, I don't know but that, if that was their Sentiment, the Verdict might have been different. Five thousand Pounds they might not think too much to give to a Gentleman who had been injured by the Conduct of his Commanding Officer acting under so very improper a Motive as that; and therefore it seems to me, that it is not absolutely impossible that the Jury might, in this vast Variety of Circumstances, perhaps, have not been satisfied about the Malice, but that they may have thought Captain *Sutton* has been brought into a very dreadful Dilemma, he has suffered most exceedingly, and ought to have some Reparation, and therefore we will give him this in Damages. Something.

thing of this Sort, I think, may have been the Case, from the Nature of the Verdict; if the Damages had been a great Deal more, it would have decided the Opinion I should have entertained upon the Ground on which they went; I should have thought, at once, it must be upon the Ground of Malice entertained in the Commodore. The Verdict being as it is, I think it is very likely it may have been mixt up with Matter that did not belong to it at all. The simple Question for them to decide was, Was there Malice in the Commodore? If there was, the Verdict, as far as it went, was proper. If there was no Malice, but probable Cause, then the Commodore ought to have had a Verdict. And I think it is fit this should once more be considered, that they may have an Opportunity of considering the Matter under the Directions they will receive, and for their own Sake, for Commodore *Johnstone's* Sake, for Captain *Sutton's* Sake, and for the Sake of the Service of the Country, this should be known to be the decided Opinion of a Jury upon full and fair Information, and that there should be no possible Doubt left in the Minds of the Subject, upon which Side this Question ought to be determined.

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Mr. Baron P E R R Y N.

I HAVE given this Cause the clearest Consideration in my Power; and during great Part of the Argument, my Opinion inclined, that this Cause had been fully before a Jury; that there was Evidence on both Sides, and that it was a proper Cause for their Decision; but am now satisfied, that this Cause has not yet been decided upon its true Merits. In order to ground this Action, there must have been Malice, and a Want of a probable Cause. I entirely concur with what Mr. *Dallas* said at the Close of his Argument, *That if all the Evidence that was laid before the Jury in this Cause had been laid before Commodore Johnstone at the Time he put Captain Sutton under an Arrest, exclusive of the Sentence of the Court Martial, I should have been of Opinion it was a probable Cause for an Arrest: That is my Idea.*—Upon the first Outset of this Business, a great Deal of Evidence has been received that ought not, in my Judgment, to have been admitted at the Trial: That was received under my Lord Chief Baron under such Circumstances, that it was not likely he could resist; therefore, without taking up any more Time, at this late Hour, or entering minutely into the several Circumstances of this Case, my Opinion is, That the Cause has not been decided upon its true Merits, and therefore it ought to go to a new Trial.



